LAW AND PREROGATIVE.

A REVIEW

OF THE LATE CASE

OF THE

Rt. Rev. W. R. WHITTINGHAM, D. D., LL. D.

BALTIMORE:
TURNBULL BROTHERS.
1875.

THE recent presentment of the Rt. Reverend William R. Whittingham, Bishop of the Diocese of Maryland, for an alleged violation of a canon of his diocese, and the action of the Board of Inquiry convened to consider the charge, deserve a more careful consideration than they seem to have received, in view of the magnitude and importance of the interests involved. Unfortunately, the circumstances which gave rise to the proceedings against the Bishop were such as to arouse the jealous spirit of party, and a misapprehension of the real question at issue became consequently inevitable. But a correct understanding of the subject, relieved of the many impertinent and immaterial issues with which zeal and ignorance have obscured it, will convince the intelligent reader that a more important question has seldom been brought to the attention of the Church. Nothing could be further from the truth than that it was one of ritualism or anti-ritualism. It was no paltry matter of the cut and color of clothes, the intonations of the voice, or the postures of the body. Nor was it even one of those graver questions of doctrine which unhappily divide the Church. The principle involved was one upon the settlement of which will depend the character of the government of the Protestant Episcopal Church, and, it may be, the integrity of that Church as now organised in the United States.

When it comes to be understood that what was charged against Bishop Whittingham as a violation of a canon of his diocese, was in effect nothing less than an assertion by him of a prerogative inherent in the Episcopal Office, superior to the obligations of the written law of the Church, acknowledging no limitation but his own uncontrolled discretion, by virtue of which he assumed to decide finally and without appeal whether a law of his diocese should be executed or not, it will at once be seen that the issue was one of universal concern, in which all who call themselves Churchmen, be they Ritualists or Anti-ritualists, High or Low, have a common and an absorbing interest. Whether the government of the Church be a government of law, or whether it be a personal government by the Bishops, exercising a power to dispense with the written law at

their discretion, and to substitute their individual judgments for those of legally-constituted tribunals, will be found upon examination to be the real question raised by the presentment of Bishop Whittingham. And whatever may have been the intention of the Board of Inquiry, the history of the case will show that their decision may fairly be cited, and it will doubtless be invoked, as an authority in favor of the doctrine of a Personal Government, regulated by Episcopal discretion, superior to and independent of the law.

In view, therefore, of the great importance of this case in its bearing upon the constitution and organization of the Church, it is hoped that the following review of its leading facts—a review which it will be the earnest effort of the writer to make in all respects fair and candid—may attract to the subject the thoughtful attention of intelligent Churchmen, to the end that the great principle at issue may be so settled as will best promote the peace, unity, and true welfare of the Church in this country.

The canons of the General Convention define the offences for which a Bishop is liable to be tried, and among them is that of violating a canon of his diocese. The General law of the Church thus provides for enforcing the laws of each diocese, and as it were adopts the diocesan codes into the body of Church legislation by declaring a violation of diocesan law to be an offence against the laws of the General Convention. The Bishop who violates the laws of his diocese is not subject to trial under those laws, but is regarded as an offender against the laws of the Church, as set forth in its constitution and general canons. The mere fact that the canon of the General Convention makes it an offence for a Bishop to violate a canon of his own diocese, ought, it would seem, to put an end to any claim of an Episcopal prerogative superior to Diocesan law. How can it be an offence to violate a law by which a man is not bound?

It is apparent that the moment it is admitted that the Bishop has, *virtute officii*, a power to disregard any law of his diocese, and to substitute for the law his own discretion, *and that such right of dispensing with the law is not defined or limited by law*, the canon of the General Convention above referred to ceases to have a practical meaning. Such a prerogative cannot co-exist with the canon in question, and the enactment of the canon would seem to be a

most emphatic declaration by the whole Church of the supremacy of law over the pretensions of prerogative. Plain as this proposition seems to be, it will be found that the act for which Bishop Whittingham was presented, amounted in effect to a denial of it; and what is of still greater consequence, that he has been sustained in that denial by a Board of Inquiry convened under the authority of the Church.

To understand the true significance of the action of the Board of Inquiry, and its bearing upon the question of Church government, it is necessary to go back to the circumstances which gave rise to the proceedings against Bishop Whittingham.

The facts of the case are substantially as follow: At a regular meeting of the Standing Committee of the Diocese of Maryland, held on the 8th of December, 1874, two presbyters, one of whom was a member of the committee, presented a written statement, to the effect that on the occasion of a funeral service at Mt. Calvary Church in Baltimore, on the 24th of October, 1874, the assistant Minister of that Church had used the commendatory prayer in the office for the Visitation of the Sick as part of the funeral service, and as a prayer for the soul of the deceased. It was further made known to the Standing Committee, that the assistant Minister of Mt. Calvary, when asked for an explanation of this use of the commendatory prayer, had justified it by declaring his belief that prayers for the faithful departed were both "Scriptural, Primitive, and Catholic," and that with this belief he had been accustomed frequently to use the commendatory prayer at funerals, and had always claimed the right to do so, by rubric and doctrine. Thereupon the Standing Committee adopted a minute, which, after reciting the foregoing facts, proceeds as follows:—"The Standing Committee feel bound, as the Bishop's Council of Advice, to call his attention to this use of the prayer of commendation, as one not only unauthorised in the office of the Burial of the Dead, but plainly contrary to the mind of this Church, in deliberately omitting from said office all such petitions, once incorporated with it, as have for their object the acceptance and purification of the departed spirit." To this minute the following was appended:— "The Committee, *anxious to avoid a formal presentment for trial*, take occasion in this way to bring the matter now before them to the notice of their Right Reverend Father

in God, the Bishop of the Diocese." These minutes were transmitted to the Bishop, and at a called meeting of the Standing Committee, held January 14th, 1875, a copy of a letter written by the Bishop to the assistant Minister of Mt. Calvary, in consequence of the minute cited above, was read. In that letter the following passage occurred, in speaking of the use of the prayer of commendation at a funeral service: "It is alleged, and in my judgment truly, that this was a depravation of the Prayer Book, by misapplication of the language of one of its prayers to a use for which it was not designed, with effect of giving to that language a meaning which it had not in the mind of the Church when providing and permitting it, and that such misuse amounted to a disloyal employment of the ministerial office, to the end of availing yourself of an opportunity for the inculcation, in a most effectual mode, and on an occasion giving the attempt peculiar importance, of a doctrine not allowed to find a place in the norm of doctrine of this Church, and of a practice persistently discountenanced by this Church, and discarded from all her formularies. This being so, it becomes my duty to express to you the regret with which I learn that such offence has been afforded, and to warn you against its repetition, by the use of the commendatory prayer as a funeral prayer, or by any similar attempt, in public teaching or worship, to inculcate or practise prayers for departed souls. *It is incontestably apparent that no minister of our branch of the Church has the right to teach as by authority, or practise as in official duty, public prayers for the departed.*"

It will be seen that up to this point the Standing Committee contented themselves with invoking the authority of the Bishop to restrain the practice complained of, and took care to inform him that they pursued that course to avoid, if possible, a formal presentment of the offending presbyter for trial. When the canon of the diocese comes to be examined, it will appear that this action of the Standing Committee was the exercise of a discretionary power clearly vested in them by law, *and in them only*, to decide whether the interests of the Church required that the matter should be pressed to the extremity of a judicial investigation. The Committee, in the exercise of that power, concluded that a trial was not expedient at that time; and while plainly declaring that a triable offence had been committed, confined themselves to

invoking the authority of the Bishop to prevent a repetition of it.

It was soon made evident that the hope of the Committee to avoid the necessity of a trial was to be disappointed, and the inefficieney of the Episeopal authority to restrain the repetition of the offenee in a form even more aggravated was speedily demonstrated. The letter of the Bishop to the assistant Reetor of Mt. Calvary, as has been said, was read at a meeting of the Standing Committee, held on the 14th of January, 1875.

At the next meeting of the Committee, on the 3d of February, 1875, there was produeed a printed pamphlet, entitled "Prayers for the Faithful Departed. Compiled by the Clergy of Mt. Calvary Church." This pamphlet eontained a eolleetion of prayers for the dead, similar to those used in the Romish Chureh, and designed for public as well as private devotion. Evidenee was laid before the Committee that this manual of prayers was distributed in the pews of Mt. Calvary Chureh, and that at the usual time for notiees in the serviees on Sunday morning, January 24th 1875, the Reetor, in the presence of his assistant already referred to, who was also his assistant in the compilation of the prayers, ealled the attention of the eongregation to the printed manual, stating that the Bishop of the Dioeese had warned them, the elergy, against the use and praetice of prayers for the dead in the public serviees, and they intended to obey his wish in the matter, but they exhorted the eongregation to take this manual, whieh they had prepared for the use of their people, as a guide and a reminder to them in publie and in private devotions for the performanee of the duty of praying for the dead. Upon proof of these facts, the Standing Committee proeeeded to frame a presentment against the assistant Minister of Mt. Calvary Church, eharging him with two offences, viz.:

1st. Aets involving a breach of his ordination vows, "always so to minister the doetrine and saeraments and the diseipline of Christ as the Lord hath eommanded, and as this Chureh hath received the same, aeeording to the commandments of God."

2d. An offence under Canon 2 of Title II. of the Digest, viz.: Holding and teaehing, publicly, privately and advisedly, a doetrine contrary to that held by the Protestant Episeopal Chureh in the United States of Ameriea, being eontrary to the teaehing of Artiele XXII. entitled "Of Purgatory."

The specifieations under these two eharges set forth in detail

the use by the accused of the commendatory prayer at the funeral service already mentioned, and also his participation in the compilation and dissemination of the manual of prayers under the circumstances above described. The specifications contained several extracts from the prayers, sufficient to show that they embodied, in the clearest and most unequivocal manner, the doctrine of prayers for the dead. A single instance will suffice as an example. Under the title of "Commemoration of the faithful departed at the Holy Eucharist," and under the rubrical provision, "While the Priest is making the oblation of the bread and wine," is the following prayer: "Accept, Holy Father, Almighty and Eternal God, this unspotted sacrifice, which I, thy unworthy servant, by the hand of thy minister offer unto Thee, the living and true God, for my innumerable sins, offences, and negligences, and for all here present, and also for all faithful Christians, both living and dead, that both to me and to them it may avail unto everlasting life."

It will be observed that notwithstanding the fact that the Bishop had already censured the presbyter for the use of the prayer of commendation at a funeral service, the Standing Committee make that act one of the specifications in their presentment.

The day after the presentment of the assistant Minister had been signed by the Committee, a presentment against the Rector of Mt. Calvary was also signed, embodying the same charges, but omitting from the specifications the use of the commendatory prayer at the funeral service referred to, that having been the act of the assistant Minister; but containing a specification, to the effect that at another funeral service, held after the Bishop's letter of warning already quoted, the Rector of Mt. Calvary had himself, in the presence of his assistant, made a like use of the commendatory prayer,—a further illustration of the efficacy of Episcopal discipline in such cases.

These presentments were delivered to the Bishop on the 8th of February 1875, by the Secretary of the Standing Committee, and the Bishop was then informed of the nature of the communications. A notice of the fact that the presentments had been made having by some means found its way into one of the city papers, the Bishop returned them to the Committee on the 9th of February 1875, with a communication in which he refused to have anything

further to do with the matter, considering the publication disrespectful to himself. His objections were removed, however, and he again received the presentments on the 18th of February 1875, and they remained in his possession until the 11th of March, when the Standing Committee sent to inquire what action he proposed to take with reference to them. The Bishop then informed the Committee that he would not send the presentments to the Ecclesiastical Court for trial, and stated among other reasons for refusing, that before he had opened the presentments, he had sent for the accused clergymen, and "settled the case" in the exercise of his authority as Ordinary. After this announcement the Bishop returned the presentments to the Committee, with a statement in writing of his refusal to act upon them, and of his reasons for so refusing Some of the Committee waited upon the Bishop, and conversed with him on the subject, and to them he stated with emphasis his refusal to order a trial of the presentments, and added that those who might be dissatisfied with his course might bring *him* to trial for it.

With one of the reasons assigned by the Bishop for his refusal we have nothing to do in the present connection, further than to point out the singular view it suggests of the functions of a court and the object of a judicial investigation. The Bishop expressed the opinion that it would be found impossible to sustain the presentments before the Ecclesiastical Court, and that the Court would decide that the acts specified did not constitute the offences charged. In that event he feared that a trial of the presentments might result in giving encouragement to those who held like views with the accused, and establish the doctrine of prayers for the dead as not forbidden in the Episcopal Church. To refuse a trial because the result might not be agreeable to the prosecution, manifests a strange indifference to the rights of the accused, and a misapprehension of the object of judicial trials, that object being quite as much the protection and vindication of the innocent, as the conviction and punishment of the guilty. If indeed the accused were innocent of the charges preferred against them, and if a trial would have resulted in establishing that innocence, it is difficult to understand upon what principle of justice they could be denied an opportunity to vindicate themselves, and be held up to the Church, as they are to this day, as offenders, when in fact they had violated none of her laws. If their acquittal would

have established the *lawfulness* of prayers for the dead in the Episcopal Church, it is not easy to understand in what manner the *unlawfulness* of that doctrine is established by refusing to try them lest they should be acquitted. It is surely to be hoped that ecclesiastical courts are not like certain tribunals once too well known in this country, which were generally believed to be "organized to convict."

But to return to those reasons assigned by the Bishop which more nearly concern the present purpose. His views on the subject are very clearly set forth in his address to the late Diocesan Convention; and although the Board of Inquiry rejected that address when offered as evidence to sustain the charge against the Bishop, the proof received by them established beyond and without dispute, that his refusal to send the accused to trial was founded upon the same views as to his power and discretion in the premises as are contained in the following passage: "A case of erroneous practice on the part of a clergyman brought before the Bishop, is, it may be, by him corrected, to his satisfaction. Others not equally satisfied, view the matter differently, and made it ground of presentment for advised teaching of doctrine contrary to that of this Church, and for violation of ordination vows. The Bishop can discover neither offence in the articles charged, and furthermore regards the case as settled by his previous action. The language of our canon, it is claimed, deprives him of the right and power to exercise his judgment in this case, and whether he regards the clergyman faulted, as liable to the charges brought or not, compels procedure to the last sad resort for redress of error in the Church, an ecclesiastical trial on charges of criminal misconduct. I could never consent to such *unworthy diminution* of my office; and *for refusing it*, it is now reported (for I have no positive notice to such effect) that I am presented to the Presiding Bishop as a violator of the canons of my diocese."

In the same address the Bishop proceeds to say that the "unhappy wording" of the canon does countenance such a procedure, and asked the Convention to amend it by making it conform to what he asserted to have been the intention of its framers, that is, by "a recognition of protective discretion on the part of the Bishop." He adds:—"In constituting the Standing Committee a jury of inquest for the assistance and relief of the Bishop, it has happened

that the language of the second clause seems to give that body the control of the Bishop's action, irrespective of his own discretion; and on the ground of that seeming contradiction of the first paragraph of the canon in the second, I am told that I am in danger of being brought to trial as a wrong-doer. I ask you to relieve me of that danger, and to make the canon clear and throughout consistent by introducing the clause of reference which I have proposed. That explains that to obtain the Bishop's instrumentality in its prosecution, the presentment received must be one duly alleging grounds as already recited in the canon; and of the dueness of such allegation the Bishop must be the judge, as provided in the outset and meant to be assumed throughout." (Journal of the 92d An. Con. pp. 72 and 73.) The Bishop expressed the hope that a vote would be taken on his amendment without debate, and moved the previous question on its adoption, but withdrew it in favor of a motion to refer the proposed amendment to the Committee on Canons. (Journal, p. 35.)

The Convention having thus distinctly brought before it the Bishop's views of his prerogative, and being urged by him to remove the restriction upon that prerogative imposed by the "unhappy wording" of the canon, after full discussion refused to adopt the amendment, and resolved to leave the law as it stood.

It will be seen that the Bishop puts his refusal to send the presentments of the two presbyters to the Ecclesiastical Court of the diocese for trial, upon the grounds, *first*, that he had a discretion to decide whether the facts specified in the presentment constitute the offences charged, and *secondly*, that whether the offenees were sufficiently alleged in the presentment or not, he was not bound to order a trial if he considered the case as "settled" by his own *previous* action. In other words, the Bishop asserted that when a presentment is made, it rests with him and not with the Standing Committee whether the accused shall be tried or not, and he regards a construction of the law which would deprive him of this power as "an unworthy diminution" of his office, to which he could never consent. He admits at the same time that the law itself on its face may have a different meaning, and that a very material amendment is necessary to make it conform to his views of the authority of his office. He does not pretend to justify his action by the terms of the canon, but by what he alleges to have been the intention of its framers; and he in effect declares that if the law is to be construed

according to the meaning implied by its "unhappy wording," he can never consent to the "unworthy diminution" of his office which would result from such a construction.

It will presently be shown that the canon not only "countenances" the construction put upon it by the presenters of the Bishop, but that it admits of no other. It is impossible to reconcile the course pursued by the Bishop with reference to the presentments, not only with any reasonable construction of the canon, but with any possible construction. The only way that the Bishop in his address attempted to make it appear that he had not violated the law, was by asserting that notwithstanding the plain meaning of the language of the canon, he knew what "in the minds of its framers it was intended to imply," and that he had conformed to *that* intention. When however, he asked the Convention to adopt such alterations of the canon as were necessary to make it conform to what *he knew* its framers meant, the Convention resolved to adhere to the meaning as expressed by the language used by the framers.

It is unnecessary to discuss the possibility of admitting, as a means of construing a statute, a resort to the testimony of witnesses as to what "was in the minds of its framers," particularly in a case where the witness himself is charged with violation of the law. The effect would be to substitute the witness for the legislator; and to justify Bishop Whittingham upon the ground that he acted in conformity with the canon *as he knew its framers intended to make it*, notwithstanding the contrary meaning of the language used, is to impute to him a power over the law so absolute as to make it unnecessary for him to appeal to Episcopal discretion for his defence. If the Board of Inquiry were governed in their decision by such a principle of construction as this, it is difficult to conceive how they could have more emphatically asserted the supremacy of the Episcopacy over the law. It is, if possible, more dangerous to the existence of law than the Episcopal prerogative itself as asserted by Bishop Whittingham. The claim of prerogative is to dispense at its discretion with enforcing the law, but the principle of construction referred to repeals the law itself, substituting for it the recollection or the will of the Bishop. When the time shall come that the law of the Church must be sought in the mind of the Bishop, instead of the canons as published by

the Convention, the question, "Who can tell how oft he offendeth?" will become very difficult to answer.

But it is from a critical examination of the canon itself that the impossibility of reconciling the power claimed and exercised by Bishop Whittingham, with the existence of law in the diocese, or even in the Church, will most strikingly appear. Such an examination will at the same time put in a clearer point of view the logical effect of the finding of the Board of Inquiry, and its bearing as an authority upon the question of the form of government in the Episcopal Church. The canon which the Bishop was charged with violating is Canon 1, Title B., of the Canons of the Diocese of Maryland, entitled "Of the mode of instituting proceedings against Clergymen," and is as follows:

Whenever the Bishop shall, either from his own observation, or from any information which he shall deem worthy of notice, have reason to believe that there are grounds for an investigation into the conduct of any Priest or Deacon of this Diocese, for having been guilty of offences for which he is liable to be tried according to Canon 2, Title II, of the Digest of the General Convention, he may in his discretion convene the Standing Committee, and lay before them the information in his possession. And whenever the Standing Committee, or a majority of them, shall, from any information so laid before them, by the Bishop, or from any other information which they or a majority of them may think worthy of notice, be of opinion that it is proper that a judicial investigation of the conduct of any Priest or Deacon should take place, they shall present that fact to the Bishop, with such a general statement of the facts of the case as may serve for a groundwork upon which charges may be drawn. It shall be the duty of the Bishop upon the receipt of such presentment, to cause the charge or charges to be drawn up in such form as will with reasonable certainty, give to the accused notice of the particular matters charged as offences. The style of the charge or charges shall be "Articles or charges against ——— ———, exhibited on behalf of the Church, to the Bishop of the Diocese of Maryland, by ——— ———, acting as Church Advocate, in consequence of a presentment made to the said Bishop, by the Standing Committee of the said Diocese."

The language of this canon is very plain, but an analysis of it may serve to present the subject more distinctly.

In the first place, it will be observed that it has no application to any offences except those for which a Priest or Deacon is liable to be tried, according to Canon 2, Title II., of the Digest of the General Convention.

Those offences are—

1. Crime or immorality.

2. Holding and teaching publicly or privately and advisedly any doctrine contrary to that held by the Protestant Episcopal Church in the United States of America.

3. Violation of the Constitution or Canons of the General Convention.

4. Violation of the Constitution or Canons of the diocese to which he belongs.

5. Any act which involves a breach of his ordination vows.

If the Bishop possess the power which he claims, and which he has exercised, he possesses it in any case in which a priest or deacon is charged with one or more of the offences enumerated in the canon above cited. If he may in his discretion refuse to try a clergyman charged with an act involving a breach of his ordination vows, he may in like manner refuse to try one charged with crime or immorality. If he may determine for himself whether the facts stated in a presentment made by the Standing Committee constitute the last four of the offences enumerated in the canon, he may equally decide for himself whether the facts so stated constitute the first of those offences. If he may refuse a trial in the case of a person charged with any of the enumerated offences, because he regards the matter as "settled" by himself in the exercise of his authority as Ordinary, he may refuse in all cases and "settle" all offences from the highest to the lowest, without resort to a judicial investigation.

It must be remembered that the power claimed by Bishop Whittingham as inherent in his Episcopal office, is the "right and power to exercise his own judgment" in cases of presentment by the Standing Committee, and decide for himself whether the case shall proceed "to the last sad resort for redress of error in the Church, an ecclesiastical trial on charges of criminal misconduct." (See his last address to the Diocesan Convention, Journal, p. 72.) And it will also be remembered that the Bishop repudiates a construction of the canon which would deny him such a "right and power," as "*an unworthy diminution*" of his office.

Very slight consideration will show the vital consequences to our system of Church government, of the admission of such a power as is claimed by Bishop Whittingham. It would practically put the clergy of his diocese under his absolute personal control. Suppose for example, that the Bishop, or any one else, should lay before the Standing Committee information tending to show that a clergyman had been guilty of crime or immorality, and that the Standing Committee should thereupon present the accused to the Bishop for trial. It is plain that the power to grant or refuse a

trial in such a case is a most momentous one, at least to the accused. If innocent, he has no other means of vindication than a judicial investigation. The Canons of the General Convention provide that he shall be liable to be tried for such an offence. The 6th Article of the Constitution enacts that the trial shall be according to the mode prescribed by the Diocesan Canon, and the Diocesan Canon provides for a trial by the Ecclesiastical Court. The accused if innocent then, can only establish his innocence legally, and completely, by the judgment of the Ecclesiastical Court. But according to the "right and power" asserted by Bishop Whittingham, the accused can only have an opportunity of vindication in case the Bishop in the exercise of his Episcopal discretion see fit to grant it to him. He may be held up to the Church and to the world as guilty of conduct unworthy of his clerical character, and, it may be, disgraceful to him as a man. He longs for an opportunity to meet his accusers face to face and relieve himself of the stigma put upon him. So far as he is concerned, the power to grant or refuse this opportunity may be little less than the power of life and death; and yet this is the power claimed by Bishop Whittingham, and confirmed by the decision of the Board of Inquiry. According to that claim and that decision, the accused, in the case supposed, however innocent, might be left under the shadow of a disgraceful charge all his life, without the means of vindication, or without other vindication than having his case "settled" by the Bishop himself in the exercise of his power as "Ordinary."

The case supposed may be said to be an extreme one, and one not likely to occur. It may be said that no Bishop would permit a Presbyter to suffer such injustice; and we are not willing to believe that such a case can ever arise. But the question is, whether under the constitution and laws of the Episcopal Church, the possibility of such an occurrence as that above suggested depends upon a written code, obligatory alike upon Bishop and Presbyter, defining by accurate bounds the powers, the duties, and the rights of each, or does it depend upon the mere personal discretion of the Bishop?

Upon the answer to this question will depend the definition of our form of Church government, whether it is a government of law, or a personal government. This vast power must either be found in the Maryland Canon, or else it is claimed and has been exercised in violation of that Canon.

It has been remarked that the Canon applies only to cases of those charged with one or more of the offences enumerated in the Canon of the General Convention. It has nothing to do with offences of a lower grade, which are left to Episcopal correction and discipline.

It will be observed that by the express terms of the Canon the Bishop has no power to cause an accused person to be tried, no matter how well satisfied the Bishop may be of the guilt of the accused and of the expediency of bringing him to trial. The Bishop can only convene the Standing Committee and lay his information before them; but the Committee are not bound to present; and if they refuse to present, no trial can take place.

Nay, the Canon expressly enacts that the Standing Committee, or a majority of them, either from the information laid before them by the Bishop, or from other information, shall decide whether it is proper that a judicial investigation shall take place. By the express terms of the law, therefore, the Committee alone have the power and right to determine whether the case shall proceed "to the last sad resort for redress of error in the Church," the very "right and power" asserted and exercised by Bishop Whittingham in the case of the Mt. Calvary presentments.

But when the Standing Committee have exercised their discretion, and have resolved that it is proper that a judicial investigation shall be had, the Canon speaks with no uncertain sound with reference to the duty of the Bishop. "*It shall be the duty of the Bishop*, upon the receipt of such presentment," etc., etc., is the language; and it is in this language that a recognition of Episcopal discretion is to be found, if anywhere in the canon. If indeed it was "in the minds of the framers" of this canon to give any discretion to the Bishop in case of a presentment by the Standing Committee, the Bishop has very happily described the language they have used when he calls it "unhappy." It admits of no discussion; its injunction is clear and express. "It shall be the duty" cannot be made to mean "it shall not be the duty" by any rule of construction; and no system of laws could survive a resort to other evidence of the intention of the lawmaker, to contradict an intention so plainly expressed in the words of the law.

Before leaving this part of the subject, it is worth while to remark that this construction of the canon is attended with none of

the consequences which follow from the assumption of a discretionary power in the Bishop.

It has been shown what absolute power over his clergy the Bishop can exercise, were it once conceded that he possesses the power to grant or withhold a trial when any of them come to be accused of the offences for which they are liable to be tried. We say absolute power; for what power can be more absolute in any organized society, than that which may at will withhold from the innocent the means of vindication, or shelter the guilty from judicial trial? So far is it from being impossible that such an abuse of the power claimed can occur, that we need not go beyond the case of the Mt. Calvary clergymen for an illustration. Those clergymen were charged, on the high authority of the Standing Committee of their diocese, with grave offences. The Bishop himself, as we have seen, condemned their conduct in language which, however guarded, is well calculated to hold these Presbyters up before the Church as grave offenders against her authority. The Board of Inquiry—without the shadow of authority, it is true, and with a strange misconception of their own functions and jurisdiction—expressed their emphatic condemnation of the alleged acts for which those clergymen were presented, in a resolution which, while it is nothing more, is yet a strong expression of opinion by a very respectable meeting of presbyters and laymen from several dioceses, and well calculated to bring those against whom it is directed into disrepute in the Church. Yet the persons thus openly and generally condemned have not been tried. They have been denied the opportunity to vindicate themselves, if innocent, and have been treated as offenders without ever having been convicted of an offence.

Such is the actual consequence, in the case of these clergymen, of the exercise of Episcopal prerogative. Two presbyters are charged with grave offences, offences involving not only their fidelity to their ordination vows, but the purity of the administration of their sacred offices, and yet by the active intervention of their Bishop they are left to undeserved censure, if they be innocent, or have offended with impunity, if they have offended at all.

Now such a result is impossible if the canon be construed as entrusting the Standing Committee with the power to determine whether it be proper that a judicial investigation shall take place,

and making it imperative upon the Bishop to send presentments, when made, to the Ecclesiastical Court for trial. Such a discretion converts the Standing Committee into a kind of grand jury, or court of inquiry; and a refusal on their part to make a presentment in a given case, amounts in effect to a judicial acquittal of the accused, and would be so regarded. On the other hand, when the Committee present, *if the Bishop must order a trial* of the presentment, the accused has full opportunity to establish his innocence before a court of his peers, and can by no possibility be left under a cloud of suspicion which may impair his usefulness in the Church and embitter his life with a hopelessness of injustice.

The only questions remaining to be considered with reference to the canon, are those arising from the claim of the Bishop to determine whether the facts set forth in the presentment constitute the offence charged by the Committee, and his assertion of a right when a presentment is made, to "settle" the case by his own action.

The Bishop has shown pretty clearly what his own opinion is as to the former of these two pretensions. In his address to the late Convention, the amendment to the canon which he proposed and urged was directed to this very point. He desired to amend the canon so as to make that part which prescribes his duty, upon the receipt of a presentment, read as follows: "It shall be the duty of the Bishop, upon the receipt of such presentment, *duly alleging grounds for investigation as aforesaid*," etc., the words in italics being the proposed amendment, and the object being to give by express grant to the Bishop the power to decide upon the sufficiency of the presentment before ordering a trial. The report of the majority of the Committee on Canons, to which the subject of the Bishop's proposed amendment was referred, (which report, we have seen, was rejected by the Convention,) adopted the amendment, and made it even more emphatic than the Bishop had asked. (See Journal 92d An. Con. pp. 48, 49). It was not without reason that the Bishop and the majority of the Committee considered such an amendment of the canon necessary to reconcile the discretion claimed by the former with the requirements of law.

It has been shown that the canon leaves it exclusively to the *Standing Committee* to determine whether "a judicial investigation of the conduct of any priest or deacon should take place,"

and it has also been remarked that the only charges which the Standing Committee are empowered by the canon to investigate, are those defined by the canon of the General Convention as offences for which a presbyter is liable to be tried. Now it must follow, that in deciding whether a judicial investigation shall be had of the conduct of an accused priest or deacon, the Standing Committee must be authorized to determine whether that conduct amounts to one or the other of the enumerated offences coming within their power of presentment. If the Committee cannot decide that question, it is difficult to understand how they can ever make a presentment at all. They can only present a presbyter when his acts constitute one of the five offences defined by the canon of the General Convention. It would seem that when information is laid before the Standing Committee touching the conduct of any clergyman, the very first question the Committee must determine before inquiring into the truth of the information, is whether the allegations, if true, amount to one of the offences for which they are authorised to present. If they think otherwise it is plain that the Committee have no power under this canon to enter upon any investigation of the facts alleged. The information may be true, or it may be false, but if it do not amount to one of the five defined offences, the Standing Committee under this canon have nothing to do with it, and can make no presentment.

It follows from these considerations that the canon confers upon the Standing Committee the power to decide for the purposes of presentment, whether in the language of the Bishop's address the "articles charged" constitute the offence.

More than this, the canon gives this power to the Standing Committee, even in a case in which the Bishop himself may appear as the informant against the accused. If the Bishop have reason to believe that there are grounds for the investigation of the conduct of a presbyter for having been guilty of one of the presentable offences, he must lay his information before the Standing Committee, and that Committee is empowered to determine, and is required to determine, whether the facts brought to their attention amount to the offence. The claim of Bishop Whittingham to decide whether the facts specified in a presentment amount to the offence charged, is therefore in direct conflict with the law, which confers that right and imposes that responsibility upon

the Standing Committee. The Committee may overrule the Bishop on this subject, but the Bishop has no legal control over the Committee.

And indeed it needs no argument to show that the assertion of such a right on the part of the Bishop is only another form of asserting his right to determine whether a trial shall take place after presentment made by the Standing Committee, and it has been shown that no countenance for the latter claim can be found in the canon. It is not meant that the presentment need not set forth one of the offences for which the Standing Committee are authorised to present. If it be defective in form, the canon makes it the duty of the Bishop to cause charges to be prepared in proper form. But when, as in the case of the Mt. Calvary clergymen, the presentments distinctly charge two of the offences for which clergymen are liable to be tried, and proceed to specify acts which, in the judgment of the committee, constitute such offences, it is not competent for the Bishop, under the canon, to overrule the judgment of the Standing Committee, and refuse to try the presentments because he differs with the Committee as to the legal effect of the acts specified. He cannot exercise this right, except in derogation of the power vested by the express terms of the canon in the Standing Committee. The plain and necessary construction of the canon requires that when a presentment is made by the Standing Committee embodying in words a charge of one of the offences for which the Committee are authorised to present, the Ecclesiastical Court of the Diocese is the only tribunal recognised by the constitution and laws of the Church which can make deliverance between the accused and his accusers, whether that deliverance be by quashing the charges (to use a legal term) as insufficient in law, or by trial of those charges on the evidence. The Bishop is required to send the charges to the Ecclesiastical Court, and that tribunal, and it alone, can pass upon the question whether the "articles charged" constitute the offence.

This brings us to the only remaining reason assigned by Bishop Whittingham for his action in the case of the Mt. Calvary clergymen. That reason is that he considered the case "settled" by his previous action. In other words, the Bishop claims that when a presbyter is presented by the Standing Committee as guilty of one of the enumerated offences, a trial may be refused because the Bishop himself may deem that he has "settled" the case by some action of his own.

It is not very clear what is meant by "settling" an offence for which a presbyter is liable to be tried under the canon of the General Convention, but it is enough to know that by this term is meant some action of the Bishop with reference to the accused which is assumed to supersede a judicial investigation. This claim on the part of the Bishop is, if possible, still more clearly in conflict with the provisions of the law than that just considered, and equally subversive of its supremacy. Bearing in mind that only the offences enumerated in Canon 2, Title II, of the Digest of the General Convention can be the subjects of presentment by the Standing Committee, and that the Diocesan Canon permits the Standing Committee alone to determine whether a charge of that kind shall be judicially investigated, and also provides the mode of investigation, the claim of the Bishop to investigate, determine and "settle" the case of one against whom such a presentment may be preferred, so as to exclude the operation of the diocesan law, is wholly irreconcilable with the idea that the Bishop is subject to the law. It is incomprehensible to minds accustomed to regard laws as rules of conduct for every member of the community by whose authority the laws are enacted. It is inconsistent with the idea of law. The 6th Article of the Constitution of the Protestant Episcopal Church in the United States provides that the trial of clergymen shall be conducted in the mode provided by the canons of his diocese.

When a clergyman then is charged with an offence for which he is liable to be tried, how can he be legally acquitted, or convicted and punished, except according to the laws of his diocese? Whatever "settling" a case of this kind may mean, it must mean something equivalent to investigation or trial, followed by acquittal, or conviction and punishment. By what authority does the Bishop assume to investigate a charge of that nature, and to pronounce the accused guilty or not guilty? By what color of authority can he assume to punish in such a case, without trial and conviction according to the laws and constitution of the Church? Apart from the provisions of positive law, it is a fundamental principle of the Episcopal Church that a Bishop has no right, directly or indirectly, to try a clergyman.

On this subject we cannot refrain from quoting, somewhat at length, the eloquent language of the author of "Contributions to the Ecclesiastical History of the Protestant Episcopal Church in the

United States," himself no mean authority upon questions of ecclesiastical polity. Speaking of a subject involving the relations between presbyters and Bishops, Dr. Hawks remarks at page 364 of the work referred to, "Now we say, that under our system of government, a bishop has no right, directly, or indirectly, to try a clergyman; he is entitled to be tried by his brother presbyters, because, among other reasons, they are supposed to have some sympathy with him and to understand from experience some of the troubles he has to encounter. * * * * It will be a sad day for the Church when the clergy, without the intervention of triers of their own order, may be tried and condemned by the Bishop alone. The smallest approach to such an encroachment should be promptly resisted. It is of vast importance to the wellbeing of the Church to preserve their just rights, to that large body of real operatives, the parochial clergy. Power always passes slowly and silently, and without much notice, from the hands of the many to the few, and all history shows that ecclesiastical domination grows up by little and little. Give the Bishops a right, without a formal trial by their peers, virtually to condemn presbyters in *one* case, and it will surely come to pass that the day will be seen when precedent will be cited for it in all cases. Antiquity, (not primitive and genuine antiquity, for that a wise man will respect, but) manufactured within a few hundred years, will be lugged in, and held up as the only guide in ecclesiastical legislation, without remembering that even pure antiquity must often yield to the altered state of society; and then come canons to bolster up the pilfered power, the spurious antiquity, until the bold usurpation has fenced itself round with a wall which even truth may long assault in vain. The overwhelming tyranny from which the Reformation freed the Protestant Church, grew up by this *paulatim process.*" It is unnecessary to add anything to what has already been said, to show that the Bishop's assertion of a power to "settle" a case in which a presentment is made, whether before or after presentment, is irreconcilable with the law of the diocese and the policy of the Church. If the Mt. Calvary clergymen have been tried at all, they have been tried by their Bishop and not by their peers; if they have been acquitted, he has acquitted them; if they have been convicted, it has been by his judgment; and it follows from all that has been said, if they have been punished, they have suffered illegally, unless the Bishop be above the law.

The review of the facts of this case, in connection with the law of the Diocese of Maryland, as it has been explained, will show that we have not misstated the nature of the questions raised by the presentment of Bishop Whittingham, nor unduly magnified their importance. A careful consideration of the facts and the law can leave no doubt that the Bishop violated the Canon of his dioeese, when he refused to send the Mt. Calvary presentments to the Ecclesiastical Court.

It has been shown that his refusal cannot be reconciled with the law upon any of the grounds assigned by him for refusing. Still less can it be claimed that the law itself confers upon him the power he has exercised in this case. The act of the Bishop then, being in violation of the plain meaning of the statute, and the several reasons by which he seeks to justify his action involving, as has been shown, the assertion of a power inconsistent with the law, it follows that he can only be sustained by aequiescing in the claim he asserts, to resist an interpretation of law which would lead to what he terms "a diminution of his office." His justification must be found in this right, unequivocally asserted in his address to the Convention, or he is without justification. It is impossible to escape the conclusion announced at the beginning of these observations, that the finding of the Board of Inquiry may be logically cited as an authority to sustain the claim on the part of the Bishop to hold the prerogative of his ecclesiastical office above the restraints of the canons of the Church.

The Board in such a case, it will be remembered, is only authorised to "hear the accusation and such proof as the accusers may produce," and to determine "whether upon matters of law and of fact, as presented to them, there is sufficient ground to put the accused Bishop upon his trial." (Digest, Canon 9, Title II., § 4.) We have shown what the law and facts were in the case of Bishop Whittingham, and the resolution of the Board "that there is not sufficient ground to put the Bishop on his trial," involves of necessity the approval of one or more of the reasons assigned by the Bishop for refusing to comply with the canon of his diocese. It is true, and perhaps fortunate, that the Board of Inquiry in this case manifested such a confused idea of their own character and functions as to detract somewhat from the weight of the decision as an authority or precedent. Members who were open and avowed advocates of the Bishop, were permitted to participate, and

did participate actively in the deliberations of the Board, against the very natural objection of the presenters, and contrary to those principles which are universally recognised as essential to the fairness and impartiality of judicial investigations. The Board also, while dismissing the charge against the Bishop, which was the only matter for its action, seems to have mistaken itself for a public meeting of some kind, and adopted a resolution condemning in very emphatic terms the alleged doings of the Mt. Calvary clergymen, whose case was not before the Board in any way, and who, with the ill-fortune which seems to have attended them from the beginning, found themselves once more tried by a court without jurisdiction, and convicted without an opportunity to defend. But as far as the decision of the Board upon the matter legally before it is concerned, it can only be regarded as supporting the extreme claims of Episcopal prerogative involved in the position assumed by Bishop Whittingham in the case of the Mt. Calvary clergymen.

The consequence of this decision, if acquiesced in by the Church, is plainly to establish as a feature of her constitution the principle of personal government as opposed to one of written laws and ordinances. But the consequences reach still further. The object and purpose of the presentment of the Mt. Calvary clergy, was to bring the legality of their practices and teachings to the test of a judicial trial. It was to have an authoritative declaration of the law of the Church applicable to those practices and teachings, and to remove those questions from the endless and aimless discussions of conventions and the press. It was an attempt to bring about peace and concord, by referring the subjects of dispute to an authority competent to bind all the disputants, a tribunal established by the laws of the Church. This effort was frustrated by Bishop Whittingham, who preferred to leave the questions as they stood, or who considered them settled by his own judgment. The result is that those questions yet remain unsettled, yet remain to disturb the peace and harmony of the Church. The action of the Bishop was virtually to defeat the effort to introduce judicial trials as a means of settling disputed questions of doctrine or practice in the Church; and not the least interesting subject suggested by this case is, whether an appeal shall be had to the tribunals of the Church to determine disputed questions, or

whether they shall be left to uncertain and never-ending discussion. The result of the long experience of the Anglican Church, so far from discouraging a resort to regular judicial investigations as a means of determining disputed questions of practice or doctrine, has been to remove, as far as possible, the obstacles to such trials, to simplify the proceedings, to diminish the expenses, and in every way to encourage the substitution of courts, with the order, fairness and dignity of their proceedings, and the binding efficacy of their judgments, for the useless wrangling of conventions, societies and polemical writers, the only results of which are the stirring up of strife and the perpetuation of discord. The Canons of the General Convention of the Church in this country appear to coincide with the policy of the Anglican Church as manifested in a late Act of Parliament, which originated in an experience of the utter failure of discussion as a means of determining differences as to doctrine or practice, and the futility of anything short of the pains and penalties of legal sentences to restrain obdurate and persistent offenders against the peace, order, and established teachings of the Church.

The recognition of a power resident in the Episcopal office to override and set at naught the laws of the Church, is fraught with consequences which cannot be too carefully considered. It involves nothing less than the admission that the Protestant Episcopal Church in the United States, composing a large and influential part of the whole population of the country, is governed as a society, not by the constitutions and canons which have been framed with so much th ought and care, but by the powers and prerogatives inherent in the Episcopal office. The tendency of modern society everywhere for nearly a century, has been towards constitutional government, and against the pretensions of personal prerogative. The recognition of the existence of such a government in the Episcopal Church cannot tend to increase its influence or enlarge its sphere of action. It will be difficult to persuade men that principles which they are taught to regard as false in civil government, are true in the government of the Church. They will not believe that power uncontrolled by law can be safely entrusted to any man, whether he be a president, a king, or a bishop. Infallibility is not one of the qualities that is transmitted in the line of Apostolical Succession, for the Apostles themselves did

not possess it to transmit. Had not St. Paul withstood St. Peter to the face, doctrines might have found a place in the Church which would have placed those infallible persons who succeeded St. Peter outside the pale of orthodoxy. The very existence of the constitution and canons of the Church, as has been said, is a continual protest against the claims of prerogative, and an assertion of the necessity of law. The action of the Board of Inquiry in the case of Bishop Whittingham, as has been shown, can only be understood as sanctioning the claims of the Bishop to subject the law to the higher authority of his office.

The case may be regarded by some as not very important in itself, but no case can be unimportant which involves such consequences. The Bishop has "settled" the case of the Mt. Calvary clergy, according to his view of "settling," but he has unsettled the law of the Church. He has assumed a power with which the experience of the Church as expressed by her laws, shows that he ought not to be entrusted. It may be a small step, but it is one step towards the assumption of greater powers. In the language of Dr. Hawks already quoted: "The smallest approach to such an encroachment should be promptly resisted. * * * Power always passes slowly and silently from the hands of the many to the few; and all history shows that ecclesiastical domination grows by little and little. Give to Bishops the right without a formal trial by their peers, virtually to condemn presbyters in one case, and it will surely come to pass that the day will be seen when precedent will be cited for it in all cases."

The presenters of Bishop Whittingham have done what they could to resist the claim of authority asserted by him in virtue of his office. They have endeavored to uphold the canon against Episcopal prerogative, and to oppose principles which they regarded as subversive of the constitution and laws of the Church. It is not their fault that the accused clergymen have failed to have a fair and impartial trial. It is not their fault if an important question of doctrine and practice yet remains unsettled by competent authority, and is left to encourage future discussion and further disturbance of the peace and order of the Church. But their effort will not have been in vain if it result in attracting the attention of the Church to the great and serious issues raised by the proceedings against the Bishop, so as to bring about an authoritative settlement of those issues.

To attain that end, it has been the object of these observations to present the real questions involved, divested, as far as possible, of everything not essential to a correct understanding of them.